Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1494

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSE RAMON MARTINEZ-FABELA AND ISMAEL CORRAL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether stopping all vehicles at a roadblock set up to check drivers' licenses violates the Fourth Amendment.

2. Whether the search of petitioners' truck was supported by probable cause and consent.

3. Whether the trial court was required to question each potential juror individually about pretrial publicity.

4. Whether the trial court sentenced petitioner Martinez-Fabela on the basis of unreliable information in the presentence report.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 823 F.2d 1389.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. A petition for rehearing was denied on January 6, 1988 (Pet. App. 21-22). The petition for a writ of certiorari was filed on March 7, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioners Martinez-Fabela and Corral were convicted of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 2). Martinez-Fabela

was sentenced to 15 years' imprisonment, and Corral was sentenced to 10 years' imprisonment (Pet. 22).

1. On April 17, 1986, New Mexico State Police officers Norman Denton and Clifford Frisk set up a roadblock on a state highway near Hobbs, New Mexico, to check drivers' licenses, registrations, and car insurance (Pet. App. 4).[1] In accordance with standard procedure, Officers Denton and Frisk sought and received permission from their supervising officer to establish the roadblock (*ibid.*). The officers parked their patrol cars facing west in the eastbound lane, and they placed a stop sign in the middle of the road. The officers stopped all eastbound traffic, with the exception of the delivery trucks from a local supermarket (*ibid.*). The officers did not stop the supermarket trucks because they knew from a previous roadblock that the drivers of those trucks had all the required logbooks, cab cards, and insurance papers (*ibid.*). The officers stopped all other vehicles at the roadblock and asked the drivers for their licenses (*ibid.*).

2. Petitioner Martinez-Fabela, who was driving a rented truck with petitioner Corral as his passenger, was stopped at the roadblock (Pet. App. 4). As Martinez-Fabela rolled down his window, Officer Denton smelled the odor of marijuana in the truck (*ibid.*). Officer Denton asked Martinez-Fabela for his driver's license and the truck rental agreement; Martinez-Fabela complied and also showed the officer an expired National Guard identification card (*ibid.*). Martinez-Fabela said that he and Corral were on their way to Atlanta to deliver furniture (*id.* at 4-5).

To determine whether Martinez-Fabela or Corral had more marijuana with them, Officer Denton asked Martinez-Fabela to pull the truck over to the side of the

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[1] Petitioners suggest (Pet. 6) that "drug detection" was the true purpose of the roadblock. As the court of appeals recognized (Pet. App. 8-9), however, the record does not support their contention.

road (Pet. App. 5). Martinez-Fabela and Corral got out of the truck, and Officer Frisk joined them. After Officer Denton told Officer Frisk why he had requested Martinez-Fabela to pull the truck over, Officer Frisk asked Martinez-Fabela for permission to look in the cargo compartment of the truck (*ibid.*). Martinez-Fabela gave his permission, and Officer Frisk began a search (*ibid.*). Officer Denton then asked Corral whether he had been smoking marijuana; Corral admitted that he had (*ibid.*). Officer Denton asked Corral for permission to look inside a suitcase that was behind a seat in the truck. Corral agreed, and the search disclosed $1,000 in $20 bills (*id.* at 6).

The officers then decided to search thoroughly the contents of the truck (Pet. App. 6). Because it was very windy, Officer Denton offered petitioners a choice between unloading the truck at the side of the road or going to a police station in Hobbs to permit a drug-detecting dog to sniff the contents of the truck (*id.* at 6-7). Petitioners chose to accompany the officers to the police station. At the station, Martinez-Fabela signed a consent-to-search form to corroborate his earlier oral consent (*id.* at 7). The drug-detecting dog then entered the truck and tried to reach some cardboard boxes that were packed underneath some furniture. The officers opened the boxes, discovered approximately 474 pounds of cocaine, and arrested Martinez-Fabela and Corral (*ibid.*).

3. The district court denied petitioners' motion to suppress the cocaine. The district court held that the roadblock was constitutional (Pet. App. 16), that the officers had probable cause to search the truck (*id.* at 16-17), and that petitioners consented to the search at the police station (*id.* at 18).

The court of appeals affirmed. In holding that the roadblock was constitutional, the court noted that it "was

established in a systematic manner to stop vehicles in a pattern which protected the public from the officers' unbridled discretion" (Pet. App. 9). The court of appeals also held that the officers had probable cause to search the truck and that petitioners voluntarily consented to the search (*id.* at 11-14). Finally, the court of appeals rejected Martinez-Fabela's contentions that the district court erred by not asking prospective jurors individually about pretrial publicity (*id.* at 3 n.1) and by considering unreliable information in the presentence report (*id.* at 14).

ARGUMENT

1. Petitioners renew their contention (Pet. 22-30) that the roadblock set up by the New Mexico State Police violated the Fourth Amendment. That argument is meritless.

The Court in *Delaware* v. *Prouse,* 440 U.S. 648 (1979), approved the type of roadblock used in this case. In *Prouse,* the Court held that the police may not randomly stop vehicles without reasonable suspicion. The Court noted, however, that the police are free to develop "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative" (*id.* at 663 (footnote omitted)).

Here, the officers set up the roadblock to check licenses, registrations, and insurance. The officers stopped all vehicles at the roadblock except for trucks from a particular supermarket; thus, they did not exercise individual discretion in determining whom to stop. Moreover, the role of the officers at the roadblock was very limited. They asked each driver for his license, registration, and proof of insurance, all of which a driver must possess under state

law.[2] Because the roadblock in this case was limited, routine, and related to valid public interests, it satisfied the standard set forth by this Court in *Prouse*. As the Court noted in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 n.14 (1976), the practice of stopping automobiles briefly to check compliance with motor-use regulations "is accepted by motorists as incident to highway use."[3]

2. Petitioners also contend (Pet. 36-39) that the state police officers had no authority to search their truck. That contention is wrong because the search was supported by both probable cause and petitioners' consent.

The courts of appeals agree that the presence of marijuana smoke or other evidence of personal drug use in the passenger compartment of a vehicle establishes probable cause to believe that drugs are concealed in other parts of the vehicle. See *United States* v. *Loucks*, 806 F.2d 208, 209 (10th Cir. 1986); *United States* v. *Burnett*, 791 F.2d 64, 65, 66-67 (6th Cir. 1986); *United States* v. *Alderete*, 546 F.2d 68, 69 (5th Cir. 1977).[4] Accordingly, Officer Denton's detection of marijuana odor gave him probable cause to search petitioners' truck.

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[2] See N.M. Stat. Ann. §§ 66-3-13 (registration), 66-5-16 (license), 66-5-229(C) (proof of insurance) (1978 & Supp. 1987).

[3] Petitioners cite (Pet. 30-36) a series of state court decisions discussing roadblocks used for enforcement of drunk-driving laws. Those roadblocks required field officers to use their discretion in stopping vehicles or their subjective judgment in determining the sobriety of drivers. In contrast, a check for drivers' licenses does not involve the officers' subjective judgment, and the officers in this case stopped all unfamiliar vehicles without exception. The type of roadblock established in this case was therefore much less likely to result in an abuse of discretion. See *Delaware* v. *Prouse*, 440 U.S. at 657.

[4] Petitioner cites (Pet. 39) several state cases that distinguish between searches of the passenger compartment of a car or van and

In addition, petitioners consented to the search of the cargo compartment of their truck. Officer Frisk asked Martinez-Fabela for permission to look in the back of the truck, and Martinez-Fabela consented (Pet. App. 5). Likewise, Officer Denton received Corral's consent to look inside the truck (*id.* at 6). The officers could have immediately opened the cardboard boxes in the truck. But the officers gave petitioners the option of having the truck searched with the help of a drug-sniffing dog at a nearby police station. Petitioners elected that option.

Petitioners contend (Pet. 47) that their consent was invalid because Martinez-Fabela did not sign a consent form until about an hour and a half after the initial stop. The timing of the signing of the consent form, however, does not undermine the voluntariness of the consent. The form was signed long after the consent was given because the consent form was produced only after the truck was taken to the police station in accordance with petitioners' choice to have the search conducted there rather than alongside the highway.

3. Petitioners also assert (Pet. 49-51) that the district court erred by not asking each prospective juror individually about the effect of pretrial publicity. The court

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searches of the trunk or storage area based on evidence of marijuana use in the passenger compartment. See *Burkett* v. *State*, 271 Ark. 150, 607 S.W.2d 399 (1980); *Wimberly* v. *Superior Court*, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); *State* v. *Walker*, 93 N.M. 769, 605 P.2d 1168 (1980). These cases all predate this Court's decision in *United States* v. *Ross*, 456 U.S. 798 (1982), where the Court held that if probable cause justifies the search of a lawfully stopped vehicle, "it justifies the search of every part of the vehicle and its contents that may conceal the object of the search" (*id.* at 825). Having probable cause to believe that the truck contained marijuana, the officers were therefore justified in examining not only the passenger compartment of the truck, but the cargo area as well.

of appeals, however, properly held that the district court did not abuse its discretion in that regard.

Federal Rule of Criminal Procedure 24(a) gives a district court broad discretion to determine the scope and method of voir dire; that discretion includes whether jurors should be questioned collectively or individually. See *United States* v. *Colacurcio*, 659 F.2d 684, 689 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982). Individual examination of prospective jurors is not required when the defendant makes only unsupported allegations of prejudicial pretrial publicity or when the publicity does not create a significant potential for prejudice. See, *e.g.*, *United States* v. *Colacurcio*, 659 F.2d at 689; *United States* v. *Mayo*, 646 F.2d 369, 373-374 (9th Cir.), cert. denied, 454 U.S. 1127 (1981). Here, petitioners offered nothing more than general allegations of pretrial publicity. In his motion for individual questioning (at 2), Martinez stated that there was "extensive pre-trial publicity," and during the voir dire Corral asserted that the case "generated a lot of publicity at the time that the defendants were arrested and the seizure was made, which necessarily resulted in a lot of newspaper coverage and matters like that" (6/2/86 Tr. 18). Petitioners, however, submitted no evidence or documentation to support their claims. The district court, therefore, did not abuse its discretion by not questioning each prospective juror individually.[5]

4. Lastly, Martinez-Fabela contends (Pet. 51) that the district court violated his right to due process because the court allegedly used unreliable information at Martinez-Fabela's sentencing hearing. The record does not support that claim.

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[5] Each of the cases that petitioners cite as calling for individual questioning (Pet. App. 49-51) involved significant pretrial publicity of the kind not shown by petitioners to be present here.

At the sentencing hearing, Martinez-Fabela challenged the statements in his presentence report that he possessed substantial amounts of cocaine and that large amounts of money had been found in his apartment. The district court stated on the record, pursuant to Fed. R. Crim. P. 32(c)(3)(D), that it did not consider those allegations in imposing sentence (Pet. App. 14). Although the district court later mentioned that information in discussing Martinez-Fabela's financial assets, the court was clear that it was not considering that information as bearing on Martinez-Fabela's sentence (8/29/86 Tr. 326). And, contrary to the assertion in the petition (at 51), the district court never stated that it was conditioning its "non-consideration" of the presentence statements on Martinez-Fabela's not presenting any evidence in mitigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60464